Winer Motors, Inc. *and* Brewery and Soft Drink Workers, Liquor Drivers, and New & Used Car Workers, Local 1040. Cases 39-CA-90, 39-CA-180, 39-CA-212, and 39-CA-249

December 16, 1982

DECISION AND ORDER

On June 3, 1981, Administrative Law Judge James T. Youngblood issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, a motion to strike Respondent's exceptions, and a supporting brief. Respondent subsequently filed an answer to the General Counsel's motion to strike.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge to the extent consistent herewith. We have also decided to modify his remedy,[4] and to adopt his recommended Order, as modified herein.

We find merit in Respondent's exception stating that the Regional Director for Region 2 acted contrary to the limitations period set forth in Section 10(b) of the Act[5] when, on April 24, 1980, she revoked her earlier approval of the withdrawal of the charge in Case 2-CA-16547,[6] and reopened the matter for further investigation into alleged discriminatory discharges occurring on June 19, 1979. Although the original charge in that case was timely filed on June 25, 1979, we hold that such a charge, subsequent to its withdrawal by the Charging Party, may not thereafter be reinstated beyond the normal 6-month period prescribed in Section 10(b) of the Act.

In examining this issue the Administrative Law Judge noted that in *Koppers Company, Inc., Forest Products Division*, 163 NLRB 517 (1967), the Board expressly held that a respondent had the right under the statute to be assured that, while no charge was on file, it would not be held liable for activities occurring more than 6 months in the past. In that decision, the Board held that to allow a withdrawn charge to be revived beyond that 6-month period would amount to a circumvention of Section 10(b).

However, the Administrative Law Judge found that he was bound by exceptions to this clear rule set forth in *California Pacific Signs, Inc.*, 233 NLRB 450 (1977), and *Silver Bakery of Newton*, 150 NLRB 421 (1964), enforcement denied 351 F.2d 37 (1st Cir. 1965). In *Silver Bakery* the Board examined the equities in a case where a Board agent had procured a charging party's agreement to withdraw charges based on the agent's erroneous advice that there was insufficient basis for the Board to assert jurisdiction in that proceeding. The Board held that Section 10(b) related only to the actual filing of charges, and that equitable considerations supported the General Counsel's decision to revoke his consent to the withdrawal of charges, notwithstanding that the case was reopened more than 6 months after the alleged unlawful conduct. In *California Pacific Signs* the Board held that Section 10(b) could not be construed to prevent the General Counsel from reinstating a dismissed charge more than 6 months after the alleged misconduct. The Board found that the General Counsel relied on newly discovered evidence and therefore did not abuse his discretion in reinstating the charge. Relying on these decisions, the Administrative Law Judge considered the equities underlying the General Counsel's decision to reinstate the charge 10 months after the alleged unlawful conduct, and on that basis found that the Regional Director did not abuse her discretion in reinstating the charge and causing a complaint to issue which included such allegations.

In reexamining the General Counsel's authority to reinstate timely filed charges subsequent to the normal expiration of the 6-month limitations period, we are guided by the Board's longstanding recognition of the proviso in Section 10(b) as being a 6-month statute of limitations.[7] Where such a

[1] In the General Counsel's brief in support of the motion to strike Respondent's exceptions, the General Counsel asserts that Respondent's exceptions lack the specificity necessary under Sec. 102.46(b) of the National Labor Relations Board Rules and Regulations, Series 8, as amended. We find no merit in this contention.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act as a result of certain statements made by Matthew Corvo in April 1980, we note that Respondent has admitted in its answer to the consolidated complaint herein that Corvo is its agent and director of operations.

[4] In computing backpay awards, it is necessary to provide the interest rationale as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[5] Sec. 10(b) of the Act contains the proviso:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. . . .

[6] The withdrawal of the charge was based on the recommendation of a Board agent. The Regional Director had approved the withdrawal on August 8, 1979.

[7] *Cathey Lumber Co.*, 86 NLRB 157 (1949), enfd. 185 F.2d 1021 (5th Cir. 1951), vacated on other grounds 189 F.2d 428.

clear limitations period has been created by Congress, we find that the Board exceeds its authority to allow the General Counsel to ignore such a limitations period on equitable grounds. In reaching this conclusion, we agree with the First Circuit's assessment when it denied enforcement of our Order in *Silver Bakery* that reinstatement of charges beyond the 10(b) period based on equitable considerations was created out of whole cloth and that:

> From the standpoint of respondents, for whom section 10(b) was enacted, we can think of no good reason why the mere filing of a charge which is withdrawn with the consent of the Board, so that no proceedings are pending, should leave in the Board a roving discretion to determine that so-called equities warrant the reinstitution of the proceedings without limit of time. The fact that the Board may feel that its discretion is benignly exercised cannot answer the clear purpose of a statute of limitations. [351 F.2d at 39.]

Accordingly, we find that the Board's allowance for reinstatement of withdrawn charges for equitable reasons is without legal justification and is contrary to the principles set forth in *Koppers Company*, as discussed above.[8] Although we are mindful that denying reinstatement of charges beyond the 6-month period precludes our consideration of alleged unfair labor practices occurring prior to that period, we consider our sympathies in that regard an insufficient basis to restrike the balance established by Congress when it added the proviso to Section 10(b). Accordingly, we hereby overrule *Silver Bakery*. Our dissenting colleagues criticize what they consider a "mechanistic application" of the 6-month limitation contained in Section 10(b). Indeed, a review of past holdings reveals that consistency of rationale[9] or result,[10] whether "mechanistic" or otherwise, has not been a hallmark of the Board's treatment of these cases. Thus, today our colleagues can only explain these results simply by stating that "the Board has consistently approved reinstatement of withdrawn charges where the equities warranted it . . . . [but] [i]n certain situations, the equities did not warrant reinstatement of the withdrawn charge."[11] Our dissenting colleagues misconstrue our holding in this case and attempt to apply our decision here to cases in which it is clearly inapplicable. We agree with the principle enunciated in the cases relied on by our dissenting colleagues that where a respondent fraudulently conceals from a charging party the operative facts underlying a violation of the Act, the limitations period does not begin to run until the charging party knows or should have known of such operative facts.[12] Such a rule, however, clearly has

[8] Chairman Van de Water and Member Hunter, however, find no rational basis for distinguishing between a withdrawn and dismissed charge. In both cases, the charge has been disposed of with the approval of the General Counsel and has, therefore, ceased to exist. Indeed, in many cases a charge is withdrawn only after the General Counsel has informed the Charging Party that, if not withdrawn, it will be dismissed. The fact that a dismissal is the product of a unilateral decision of the General Counsel does not create any power to extend the limitation contained in Sec. 10(b). Accordingly, in their view the principle expressed in *California Pacific Signs, Inc.*, is incorrect and they would overrule that case.

[9] In *Silver Bakery, supra*, the General Counsel was found to have "virtually unlimited discretion to proceed on charges as he deems fit" unless "the equities" compelled a dismissal. Then, in *Koppers, supra*, respondent unions were found to have "a right under the statute to be assured that they would not be held liable for activities occurring more than 6 months past," a right which was apparently not contingent upon a showing by Respondent that "the equities" compelled dismissal. In *California Pacific Signs, Inc., supra*, the "virtually unlimited discretion" of the General Counsel resurfaces, with the respondent required to show an abuse of the General Counsel's discretion. The seemingly contrary holding in *Koppers* was disposed of on the ground that, unlike the situation in *Koppers*, the charging party in *California Pacific* had not voluntarily withdrawn the charge nor asked that it be reinstated (whatever relevance the failure to request reinstatement may possess). Today, our colleagues apparently hold that the General Counsel's discretion in these matters is somewhat less than "virtually unlimited," since they speak more of "the equities" and "fraud" and less of the General Counsel's discretion than they did in *Silver Bakery* and *California Pacific Signs, Inc.*

[10] Compare *Silver Bakery, supra*, with *Koppers, supra.*

[11] *Infra.* Our colleagues also state that, since the legislative history refers only to barring litigation "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," they have done "no violence" to the purpose of Sec. 10(b) if such evidence is still available. By that logic, any charging party should be permitted to file an original charge outside the 10(b) period so long as he or she can show no prejudice to the respondent.

[12] *Local 825, International Union of Operating Engineers, AFL–CIO (Building Contractors Association of New Jersey)*, 228 NLRB 276 (1977), cited in the dissent, is a case which turned on the Board's interpretation of the facts, the majority finding that the charging party withdrew his charge in reliance on respondent's false statements concerning its hiring hall rules, and the dissent finding that there was no fraud involved and thus no reason to toll the limitations period. This case clearly has no application or relevance to the situation here. In *Local 825*, respondent allegedly gave a false explanation to the charging party as to the reason for his nonreferral which *induced him* to withdraw his charge. Here, the Board investigated the charge, determined that it was lacking in merit, and solicited a withdrawal. That the Respondent did not confess to unfair labor practices during the original investigation but, rather, denied the allegations or proferred an economic defense, does not constitute the type of "fraud" warranting reinstitution of a charge in spite of the 6-month limitation of Sec. 10(b). *N.L.R.B.* v. *Don Burgess Construction Corporation, d/b/a Burgess Construction, Builders, and Donald Burgess and Verlon Hendrix, d/b/a V & B*, 596 F.2d 378 (9th Cir. 1979), enfg. 227 NLRB 765 (1977); *Pullman Building Company*, 251 NLRB 1048 (1980); and *Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of Plumbers and Pipefitting Industry of the United States and*

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no application to the case before us where the alleged discriminatees were not ignorant of the alleged violation within the limitations period.[13] Further, we take issue with our dissenting colleagues' position that our decision here unduly rewards respondents for deceiving the General Counsel concerning the motive for or nature of its misconduct. It is a rare case where a respondent agreed with a charging party's assessment that respondent engaged in conduct violative of the Act. Rather, in most cases, respondent denies the misconduct alleged or proffers an explanation, and the General Counsel must decide if the evidence is sufficient to sustain the charging party's position. If so, the General Counsel issues a complaint; if not, he dismisses the charge. In other words, the denial of the misconduct by the respondent should not be and is not dispositive of the charge as our dissenting colleagues imply.

It is, therefore, our dissenting colleagues who have taken the illogical position of agreeing on the one hand with the proposition enunciated by the Board in Koppers Company that a withdrawn charge cannot be reinstated outside the limitations period but then, on the other hand, carving out a narrow exception which allows reinstatement of a withdrawn charge if the withdrawal was prompted by a recommendation from a Board agent. We fail to find, nor have our dissenting colleagues supplied, any legal basis for this exception, which clearly operates to circumvent the requirement of the proviso to Section 10(b) of the Act.

Therefore, we shall dismiss allegations that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off employees Robert Moody, Uli Plum, and Stephen Bernstein on July 19, 1979,[14] and we shall revise our Order accordingly.[15]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Winer Motors, Inc., Stratford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete the words "laying off" from paragraph 1(g).

2. Delete the name "Stephen Bernstein" from paragraph 2(c).

3. Insert the following as paragraph 2(e) and reletter the subsequent paragraphs accordingly:

"(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER ZIMMERMAN concurring:

I join Chairman Van de Water and Member Hunter in reversing the Administrative Law Judge in this case, and in overruling *Silver Bakery of Newton*.[16] I cannot accept their discussion of *California Pacific Signs, Inc.*,[17] however, which they would overrule.

Silver Bakery involves the issue of whether the General Counsel may reinstate a *withdrawn* charge outside the limitations period of Section 10(b); the issue in *California Pacific Signs* is whether the General Counsel may reinstate a dismissed charge outside that period. Although neither my colleagues in

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Canada, AFL-CIO (Mechanical Contractors Association of Washington), 242 NLRB 1157 (1979), cited by our colleagues, are similarly distinguishable. In *Don Burgess*, the charging party union was not aware that Respondent was even employing carpenters, let alone nonunion ones. In *Pullman*, the Charging Party union was unaware that respondent was operating a nonunion jobsite. In *Plumbers and Steamfitters Local No. 40*, the charging party was unaware that his name had been removed from a hiring hall list and the Administrative Law Judge noted that, in such cases, "'the six month limitation period *does not begin to run* until the . . . unlawful activity . . . has become known to the charging party. [Citations omitted.]' *N.L.R.B.* v. *Allied Products Corporation, Richard Brothers Division*, 548 F.2d 644, 650 (6th Cir. 1977)." 242 NLRB at 1161. (Emphasis supplied.) Thus, in all these cases, the 10(b) period was tolled because the charging party did not have reason to believe that an unfair labor practice had been committed and, therefore, had not filed a charge. Our colleagues appear to mistakenly equate these situations with those in which, as here, the General Counsel has belatedly determined that a complaint should issue on an already-withdrawn charge.

Nor does a denial of allegations previously made constitute fraudulent concealment. See *Dayco Corporation* v. *Firestone Tire & Rubber Co.*, 386 F.Supp. 546, 549 (D.C. Ohio 1974), affd. *sub nom. Dayco Corporation* v. *Goodyear Tire & Rubber Company*, 523 F.2d 389 (6th Cir. 1975). Yet as pointed out by the First Circuit in *N.L.R.B.* v. *Silver Bakery of Newton*, 351 F.2d at 39, our colleagues have "created out of whole cloth" an ill-defined standard that would permit the revival of long-deceased charges whenever allegations of equitable considerations are raised.

[13] *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), relied on by the dissent, does not stand for the proposition that general equitable considerations will toll a statute of limitations. There, the Court said, "If Congress explicitly put a limit upon the time for enforcing a right which it created, there is an end of the matter." *Id.* at 395. *Holmberg* involved no specific limitation such as Sec. 10(b) contains.

[14] In view of our refusal to allow reinstatement of the charge in Case 2-CA-16547 for the reasons stated above, we do not pass on the General Counsel's claim that Respondent has attempted to introduce evidence not in the record in support of its claim that the Regional Director for Region 2 abused her discretion in reopening that case.

[15] Our modified Order providing for reinstatement and backpay for employees Moody and Plum is based on separate violations occurring within the applicable 10(b) period, as set forth in the Administrative Law Judge's Decision.

[16] 150 NLRB 421 (1964), enforcement denied 351 F.2d 37 (1st Cir. 1965).

[17] 233 NLRB 450 (1970).

the majority nor those in dissent would distinguish these issues, I believe the Act compels their distinction.

Section 3(b) of the Act plainly accords the General Counsel broad discretion in determining whether to issue a complaint. Nonetheless, it is equally clear that one prerequisite to his complaint authority is the existence of a charge filed by a party alleging the commission of an unfair labor practice. Once a charging party voluntarily decides for whatever reasons to withdraw a charge, it ceases to exist. It "is no charge at all," *N.L.R.B.* v. *Central Power & Light Company*, 424 F.2d 1318, 1321 (5th Cir. 1970). Moreover, as Section 10(b) establishes a 6-month statute of limitations, "absent the existence of a properly served charge on file, a party is assured that on any given day his liability under the Act is extinguished for any activities occurring more than 6 months before." *Olin Industries, Inc.*, 97 NLRB 130, 132 (1951).

That is not at all the case where the charge is not withdrawn by the charging party, but instead is subsequently dismissed by the Regional Director as lacking in merit. That charge continues to exist; the charged party has received proper notice; and the charging party has in no way conceded any lack of merit in the charge filed. The statutory prerequisite for a complaint therefore remains, and the General Counsel thus retains his discretionary authority to reinstate the charge if he has reason to believe that his initial decision was erroneous.

In my judgment, there is a rational and statutorily based foundation for allowing reinstatement of a dismissed charge, while prohibiting reinstatement of a charge voluntarily withdrawn by a charging party. Accordingly, I join with Members Fanning and Jenkins in reaffirming the principle enunciated in *California Pacific Signs*, that Section 10(b) does not bar the General Counsel from reinstating a dismissed charge more than 6 months after the alleged misconduct.

MEMBERS FANNING and JENKINS, dissenting in part:

When *Silver Bakery*[18] was decided, this Board paid careful regard to the express language in Section 10(b), finding that it related only to the actual filing of charges. This Board further paid close attention to the legislative history behind the creation of this 6-month period of limitations, noting that:

> As the Supreme Court explained, the "policies [of the 6-month limitation of Section 10(b)] are to bar litigation over the past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.'"[19]

A reexamination of the appropriate congressional history reveals no additional expression of congressional intent other than that quoted above. Accordingly, the Board was careful to do no violence either to the language or to the purposes of Section 10(b), when it asserted no absolute time bar to the reinstatement of timely filed charges where no records were destroyed, witnesses were available, and recollections kept fresh. In providing for such reinstatement the Board based its decision on the authority Congress conferred under Section 3(d) of the Act that the General Counsel "shall have final authority, on behalf of the Board, in respect to the investigation of charges and the issuance of complaints before the Board." As a result, since that time the Board has consistently approved reinstatement of withdrawn charges where the equities warranted it, notwithstanding such reinstatement was beyond the normal running of the 6-month limitations period. See, for example, our recent decision in *Kennicott Bros. Company*, 256 NLRB 11 (1981), and cases cited therein. In certain situations, the equities did not warrant reinstatement of the withdrawn charge. See *Koppers Company, Inc., Forest Products Division*, 163 NLRB 517 (1967).

A majority of the Board, however, has now decided to disrupt established Board doctrine, and to require a mechanistic application of the 6-month limitation in Section 10(b) so as to preclude consideration of timely filed charges. In effect, they are finding that Section 10(b) establishes a jurisdictional restriction rather than a statute of limitations, a view the Board previously has rejected.[20] Their majority's fundamental claim that "equitable considerations" may not serve as a basis for tolling a statute of limitations is a house of cards, and their refusal to allow reinstatement of the charge herein has allowed Respondent to reap the benefit stemming directly from its misrepresentation to Board investigators of the reasons for the discriminatory layoffs which were the focus of the investigation.

In *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946), the Supreme Court stated:

> [W]here a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run

[18] *Silver Bakery Inc. of Newton*, 150 NLRB 421 (1964).

[19] *Id.* at 425; *Local Lodge No. 1424, International Association of Machinists [Bryan Manufacturing Co.]* v. *N.L.R.B.*, 362 U.S. 411, 419 (1960); H. Rept. 245, 80th Cong., 1st sess. 40.

[20] See *Vitronic Division of Penn Corporation*, 239 NLRB 45 (1978); *Chicago Roll Forming Corp.*, 167 NLRB 961 (1967). See also *N.L.R.B.* v. *A. E. Nettleton Co.*, 241 F.2d 130 (2d Cir. 1957).

> until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." . . .
>
> *This equitable doctrine is read into every federal statute of limitation.* [Emphasis supplied.]

In view of such a clear pronouncement regarding every Federal statute of limitations, there is no doubt that equity may be considered in examining Section 10(b). If any dispute should arise, it should be over *how* such equity should be applied. The majority, however, should it rigorously apply this new approach to Section 10(b), must disallow all equitably based tollings of the 6-month limitation. In addition to situations involving fraudulent concealment as noted above,[21] the Board has uniformly tolled the limitations period until the party affected by the alleged misconduct acquires actual or constructive notice of its occurrence.[22] Should the majority hereafter decide that such decisions remain valid, their decision, of necessity, will be based on equitable considerations.[23]

In this case the Administrative Law Judge concluded that Respondent's proffered economic defense to the layoffs covered by the reinstated charge was "a pure sham and a pretext to cover up its true motive." As this defense was the one initially accepted by the General Counsel and apparently the basis upon which the Charging Party's withdrawal was solicited by the Board agent, it is quite clear that the majority now serve to reward Respondent for its misleading misrepresentations to Board investigators.

We think the equities in the case clearly support the reinstatement of the charge. The Charging Party acted promptly in filing the charge; the Respondent has shown no prejudice resulting to it from the delay occasioned by the withdrawal and later reinstatement of the charge; and the Respondent's misleading defense contributed to the withdrawal of the charge. We would find in these circumstances that the General Counsel has struck a proper balance between the policy of Section 10(b) to bar stale litigation and the broad remedial policy of the Act.

MEMBERS JENKINS, dissenting further:

In addition to the points raised by Member Fanning and me in our joint dissent, there are additional reasons why the majority is in error. My colleagues in the majority equate the assertion of a pretextual defense with a simple denial of alleged misconduct. This equation, however, overlooks the evidence in the present case that Respondent did more than simply deny misconduct. On the contrary, it affirmatively acted to mislead the General Counsel that the discharges were economically motivated. In the face of such affirmative misrepresentations, a party should not be precluded from reinstating a charge because of a mechanical application of Section 10(b). In *Local 825, International Union of Operating Engineers, AFL-CIO (Building Contractors Association of New Jersey)*, 228 NLRB 276 (1977), the Board agreed that, where the withdrawal of a charge is based on a respondent's misrepresentation of its conduct, such a pretextual defense prevents the running of the 10(b) period. This is precisely the factual situation before us now. As stated by another administrative law judge in a related setting:

> Section 10(b) is a shield to protect charged parties against the consequences of delay rather than a shield by which wrongdoers may entwine the 6-month limitation within a purposeful scheme to effect discrimination in a manner leaving the victims without statutory remedy. [*Strick Corporation*, 241 NLRB 210, 215 (1979).]

Here, Respondent maintained its sham claim of economic need for the layoffs for the entire period material herein, despite its later commission of 8(a)(1) and (3) violations which uncovered its discriminatory motive for the layoffs, and upon which basis the Regional Director decided to reinstate the original charge. Under the majority's reasoning, not much imagination is required to foresee that Section 10(b) may now serve to frustrate the purposes of the Act. All that is required is for a respondent successfully to deceive the General Counsel concerning the motive for or nature of its misconduct, have the General Counsel cause the charge to be withdrawn, and reap the windfall in due course.

Further, the majority, in finding *Holmberg, supra*, inapplicable, emphasizes that the Federal statute at issue in that case involved no specific limitation as in Section 10(b), and that an express time limitation established by Congress "puts an end to the

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[21] See *N.L.R.B.* v. *Don Burgess Construction Corporation, d/b/a Burgess Construction*, 596 F.2d 378 (9th Cir. 1979), enfg. 227 NLRB 765 (1977).

[22] See *Pullman Building Company*, 251 NLRB 1048 (1980); *Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors Association of Washington)*, 242 NLRB 1157 (1979), and cases cited therein.

[23] Apparently recognizing the weaknesses of their approach, the full majority declines to overrule *California Pacific Signs, Inc.*, 233 NLRB 450 (1977), on the basis that that case involved a dismissal of a charge, not a withdrawal. The withdrawal of a charge in lieu of dismissal is solicited by the General Counsel for the purpose of administrative convenience, and there is simply no rational basis for distinction between that and a dismissal. Both withdrawals and dismissals, in the final analysis, are matters which the General Counsel has authority to grant or deny in his discretion. See *Alberici-Fruin-Colnon*, 226 NLRB 1315, 1316 (1976).

matter." Contrary to the majority's interpretation of *Holmberg*, the Court expressly extended consideration of equity beyond the factual confines of that case by finding it applicable even in the face of a specific statute of limitations. The Court stated:

> *If* the Federal Farm Loan Act had an *explicit statute of limitation* for bringing suit under Sec. 16, the time *would not have begun to run* until after petitioners had discovered or had failed in reasonable diligence to discover, the alleged deception . . . which is the basis of this suit. [327 U.S. at 397 (emphasis supplied).]

Further, the majority's reliance on a quotation from *Holmberg* that a time limitation established by Congress "puts an end to the matter," has been taken out of context, and is inconsistent with the Court's express extension of its doctrine quoted above. Taken in proper context, the Court merely stated that Federal law may preempt state law in Federal court.

In any case, the majority's claim that certain of our decisions remain valid ignores that the basis for such decisions clearly lies in equitable considerations. See *Holmberg, supra*. In finding that equitable considerations may not be utilized here, the majority refuses to recognize its patently inconsistent legal analysis. However, the majority is *de facto* determining *how* such equity should be applied, not that it *may not* be applied. Although the lead opinion states that these Board decisions which remain valid are inapplicable because of different facts, their applicability is based not on facts, but on the principles involved; i.e., equitable principles. They have provided no basis for distinguishing the present case from others involving fraudulent concealment or the failure to file a charge within the 10(b) period because of no notice of the operative events. Both of these still-valid exceptions are not contained within the statutory language in Section 10(b) and are equally susceptible to a claim that they were "created out of whole cloth," which appears to be the basis for the majority's finding that no exception to Section 10(b) is sanctioned here. The majority's decision to overrule Board precedent is internally inconsistent and contrary to Supreme Court doctrine.[24]

[24] See also *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), where the Supreme Court similarly ruled that a statutory limitations period may not apply where a defendant's reliance on the statute would be inequitable under *estoppel* principles.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT solicit our employees to abandon support for Brewery and Soft Drink Workers, Liquor Drivers, and New & Used Car Workers, Local 1040.

WE WILL NOT threaten our employees that it will be futile for them to select the above-named Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with the denial of reinstatement unless they abandon their support and assistance for the Union.

WE WILL NOT threaten our employees that no new employees will be hired until the employees abandon their support of the Union.

WE WILL NOT threaten our employees with physical harm if they join, support, or assist the Union.

WE WILL NOT threaten our employees with layoff if they join, support, or assist the Union.

WE WILL NOT constructively discharge, discharge, or otherwise discriminate against our employees because of their activities on behalf of the Union, or any other labor organization, to discourage membership in the Union or any other labor organization of our employees.

WE WILL NOT discourage membership in the Union, or any other organization of our employees, by discriminating in regard to hire, tenure, or other terms and conditions of employment.

WE WILL NOT unilaterally change the working conditions of our employees by instituting disciplinary warning systems or initiating new pay plans, and WE WILL NOT in any other manner change the working conditions of our employees without bargaining with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL immediately discontinue our discriminatory warning system, and immediately discontinue our discriminatory new pay plan relating to after-market services.

WE WILL, upon request, bargain with the Union as the exclusive representative of our employees in the following described unit at our facility in Stratford, Connecticut:

All full-time and regular part-time new and used foreign and domestic automobile salespersons employed by the employer; excluding office clerical employees, service and maintenance employees, guards and supervisors as defined in the Act.

WE WILL offer immediate and full reinstatement to Robert Moody, Uli Plum, and Robert Tevolits or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered as the result of our discrimination against them, with interest.

WE WILL immediately rescind all warnings issued our employees under the discriminatory warning system which we promulgated.

WINER MOTORS, INC.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge: The consolidated complaint which issued on August 12, 1980, alleges that Winer Motors, Inc. (herein Respondent the Employer), engaged in various acts and conduct in violation of Section 8(a)(1), (3), and (5) of the Act. Respondent filed an answer to the consolidated complaint in which it admitted the jurisdictional allegations of the complaint; that it is an employer within the meaning of Section 2(6) and (7) of the Act; that Brewery and Soft Drink Workers, Liquor Drivers, and New & Used Car Workers, Local 1040 (herein the Union), is a labor organization within the meaning of Section 2(5) of the Act; that certain named individuals in the complaint are supervisors and agents of Respondent within the meaning of Section 2(13) of the Act, but denied the commission of any unfair labor practices. Additionally, Respondent asserts that the allegations of the complaint relating to the layoff of June 19, 1979, of its employees, Robert Moody, Stephen Bernstein, and Uli Plum, and the facts surrounding this layoff are barred by Section 10(b) of the Act. This matter was heard before me on November 19 and 20, 1980, and December 9 and 10, 1980, in New Haven, Connecticut. The parties were represented at the hearing and following the hearing the General Counsel and Respondent filed post-trial briefs which have been duly considered.

Upon the entire record in this matter, and from my observation of the witnesses and their demeanor, and after due consideration of the briefs filed herein, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS[1]

I. THE BUSINESS OF THE EMPLOYER

Respondent, a Connecticut corporation, maintains its principal office and place of business in Stratford, Connecticut, where it is engaged in retail sale and service of new and used foreign and domestic automobiles. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Around March 7, 1979, Respondent discharged 9 of its 11 new-car salesmen. These fringes occurred several days after these nine salesmen had signed authorization cards for the Union. The next day the Union placed a picket line at Winer Motors in Stratford, Connecticut. The day or night following the discharges, March 8, 1979,[2] Allan Winer, Respondent's executive vice president, was approached by Edward Iulo, business agent for the Union, who informed Winer that he represented a majority of Respondent's salesmen and requested bargaining. Thereafter, Allan Winer approached the pickets and offered to return them to work without the Union and also offered them individual contracts. The salesmen continued picketing for approximately 10 days at which time they were returned to work by agreement of Respondnet and the Union. An election was held on June 1, 1979. The Union was ultimately certified as the collective-bargaining representative of Respondent's salesmen by the National Labor Relations Board and the Board's Decision and Order was enforced by the Second Circuit Court of Appeals in November 1980, while this hearing was in progress.

The 10(b) Argument Relating to the Alleged Discriminatory Layoff of Three Employees on June 19, 1979

On June 19, 1979, Respondent laid off three of its employee salesmen, Robert Moody, Stephen Bernstein, and Uli Plum, ostensibly for economic reasons. On June 25, 1979, the Union filed a charge in Case 2-CA-16547 with the Board's Region 2 in New York City, New York. This charge was timely filed well within the 6-month

[1] The facts found herein are a compilation of the credited testimony, the exhibits, and stipulation of facts, viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this Decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required, I will set forth specific credibility findings.

[2] Unless otherwise specified all dates refer to 1979.

limitation of Section 10(b) of the Act.[3] On August 8, 1979, this charge, Case 2-CA-16547, was withdrawn and that withdrawal was approved by the Board's Regional Director for Region 2 without explanation on that date. Edward Iulo testified that he withdrew that charge on the recommendation of a Board agent with the New York Regional Office.

On December 13, 1979, the Union filed Case 39-CA-48 with the Board in Hartford, Connecticut. That charge alleged that the Employer imposed and implemented a discriminatory warning system, harassed union supporters, and offered reinstatement to Jim Plum if he abandoned the Union. On December 26, 1979, this latter charge was amended to include the June 19, 1979, layoff of Respondent's three salesmen. On January 8, 1980, this charge Case 39-CA-48 was withdrawn and approved by the Board on that date. Following the amendment to this charge, the Union in December 1979, at the suggestion of a Board agent in Hartford, requested that the Board office in New York reopen the layoff charges that had been filed on June 25, 1979, and withdrawn on August 8, 1979.

On April 24, 1980, the Regional Director for Region 2 in New York advised Respondent that certain questions had been raised in Case 2-CA-16547 and referring Respondent to *California Pacific Signs, Inc.*, 233 NLRB 450 (1977), advised that "Accordingly, I am revoking my approval of Charging Party's withdrawal in this case, and reopening the matter for further investigation." In the same communication the Regional Director advised that the case was being transferred to Subregion 39, and would thereafter be referred to as Case 39-CA-212. By Order dated April 25, 1980, the case was formally transferred to and continued in Subregion 39 as Case 39-CA-212.

Respondent argues that although the original charge in Case 2-CA-16547 was timley filed on June 25, 1979, it was subsequently withdrawn on August 8, 1979, and there was no charge pending at the time the 6-month limitation period, provided by Section 10(b) of the Act, expired on or about December 19, 1979. Since Section 10(b) of the Act is a 6-month statute of limitatations, any properly served charge can allege as an unfair labor practice only activities of a Respondent which occur not more than 6 months prior to the date of service of the charge.[4]

The General Counsel, recognizing the teachings of the *Koppers* case, agrees that generally a withdrawn charge cannot be reinstated alleging the same offense if more than 6 months has passed since the occurrence which gave rise to the alleged unfair labor practice. But, argues that a different rule applies where a charge is withdrawn pursuant to the mistaken advice of a Board agent, in which case a regional director can reopen the charge even in excess of 6 months after the alleged unfair labor practice occurred. In support of this proposition the General Counsel cites *Silver Bakery, Inc.*, 150 NLRB 421 (1964). In that case charges were timely filed on March 8, 1962. On March 13, 1962, an agent of the Board interviewed the respondent employer's principal stockholder. As a result of the commerce information gathered during this interview the Board agent represented to the charging party that the Board would not assert jurisdiction and on that date, the charging party agreed to withdraw the charges. On March 15, 1962, the Regional Director notified all parties that he had approved the withdrawal of the charges without prejudice. As a result of a state proceeding it was learned that the National Labor Relations Board did in fact have jurisdiction over the respondent employer and on June 1, 1963, the charging party requested the Regional Director to reinstate the charges and to reopen the cases. On July 22, 1963, the Acting Regional Director withdrew his consent to the withdrawal of the charges and reopened the cases for investigation on their merits, and on November 12, 1963, issued a complaint. Although the Trial Examiner concluded that the charges had merit he nevertheless recommended dismissal of the complaint on the ground that it was barred by Section 10(b) of the Act. In disagreeing with the Trial Examiner the Board concluded that Section 10(b) relates only to the actual filing of charges, and the General Counsel acting in the public interest to effectuate the policies of the Act has virtually unlimited discretion to proceed on charges as he deems fit in the exercise of his office. And there is nothing in the Act limiting his authority to issue a complaint once the charge is filed. Once the charge has been timely filed the only question then is whether the equities in the case compel a dismissal of the complaint and charges in view of the time that has lapsed between the withdrawal of the charge and the Regional Director's notice to the parties of his decision to reopen the case.

In *N.L.R.B.* v. *Silver Bakery, Inc. of Newton, Massachusetts, et al.*, 351 F.2d 37, 38 (1965), the United States Court of Appeals for the First Circuit denied enforcement of the Board's Order stating that:

> We cannot, however, agree with the Board that the present proceedings were not prosecuted in violation of Section 10(b) of the Act. O'Brien was discharged on February 5, 1962. He filed charges on March 8, 1962. A week later, due to what proved to be inadequate investigation, the regional director informed O'Brien that the employer did not meet the Board's jurisdictional standards, and requested that he withdraw the charges without prejudice. This was done, with the Board's consent. The respondents knew of the charges and of the fact that they were withdrawn without prejudice. Conceivably they knew the reason for the withdrawal, but they in no way contributed to the regional director's mistake.
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> Section 10(b) is clearly an ordinary statute of limitations. . . . It has been applied, consistently, so

[3] The charge was signed by Edward J. Iulo on June 21, 1979, but it was not filed until 12:28 p.m., June 25, 1979.

[4] In *Koppers Company, Inc. Forest Products Division*, 163 NLRB 517 (1967), the Board stated that "The practical effect to the proviso to Section 10(b) is that, absent the existence of a properly served charge on file, a party is assured that on any given day his liability under the Act is extinguished for any activities occurring more than 6 months prior thereto."

far as we can discover, to bar "reinstated" charges after withdrawal of an original, timely charge. Cf. *N.L.R.B.* v. *Electric Furnace Co.*, 6th Cir., 1964, 327 F.2d 373; *Olin Industries, Inc.*, 1951, 97 NLRB 130. There was no statutory basis in the Act for holding the statute to be tolled, and no other ground. The Board's broad proposition that once a complaint has been filed and dismissed only so-called equitable principles determine when it can be reviewed was created out of whole cloth. From the standpoint of respondents, for whom Section 10(b) was enacted, we can think of no good reason why the mere filing of a charge which is withdrawn with the consent of the Board, so that no proceedings are pending, should leave in the Board a roving discretion to determine that so-called equities warrant the reinstitution of the proceedings without limit of time. The fact that the Board may feel that its discretion is benignly exercised cannot answer the clear purpose of a statute of limitations. The order may not be enforced.

The General Counsel also cites *Communications Workers of America, AFL-CIO, Local 1127 (New York Telephone Company)*, 208 NLRB 258 (1974). In that case a charge was timely filed on May 8, 1972, alleging a violation. Investigation of that charge apparently indicated to the Regional Director that the charge had no merit and the charging party was requested to withdraw his charge. A withdrawal request was submitted by the charging party on June 4, 1972, and approved on June 20, 1972. Subsequently the Regional Director concluded that the withdrawn charge had merit and so advised the charging party. Accordingly on January 22, 1973, the charging party requested that his charge be reinstated. On January 23, 1973, the Regional Director issued an order withdrawing his approval of the withdrawal request and reinstated the unfair labor practice charge and on January 31, 1973, issued a complaint pursuant to the reinstated charge. Relying on the *Koppers* case respondent argued that the reinstated charge was barred by Section 10(b) of the Act. The General Counsel on the other hand argued that the *Kopper* case was not controlling, because in that case no equitable considerations were presented to justify reinstatement of the charge, and relied upon the Board's decision in *Silver Bakery*. After exhaustive research the Administrative Law Judge concluded that there is no clear authority for the proposition that the Board still adheres to its *Silver Bakery* decision, however, absent a clear indication by the Board that it had abandoned the principle enunciated in *Silver Bakery* he was bound by that decision and found that the complaint was supported by a timely charge. He further stated that even if the reinstated charge were deemed untimely, the charging party was covered by another charge sufficiently broad to make his inclusion in the complaint proper. The Board affirmed the Administrative Law Judge, but stated that as the other charges are broad enough to cover the allegations of unlawful conduct against Clayton Mitchell, we need not pass on the question of whether Mitchell's own charge was barred by Section 10(b) of the Act.

In addition to the above cases the General Counsel also cites *California Pacific Signs, Inc.*, 233 NLRB 450 (1977), and other cases decided on similar facts.

In *California Pacific Signs, Inc.*, the charge was initially filed on November 10, 1975. On February 3, 1976, the charge was dismissed by the Region and on March 17, 1976, the dismissal was affirmed by the General Counsel in Washington. Thereafter, on August 6, 1976, based on newly discovered evidence, the General Counsel reinstated the charge. Respondent argued that the reinstatement of the charge was barred by Section 10(b) of the Act. In concluding that Section 20(b) was not a bar to the charge the Board stated at 457:

> Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of a charge with the Board. This section, however, relates only to the actual filing of charges and, once a charge has been timely filed, the control over, and disposition of, that charge is vested exclusively with the General Counsel pursuant to Section 3(d) of the Act. The General Counsel thus has virtually unlimited discretion to proceed on such timely filed charges as he deems fit[5] and, in the absence of a showing of abuse of the discretion, the Board will not interfere with the General Counsel's exercise thereof. This is not to suggest that a charging party may file a charge, voluntarily withdraw it, and subsequently reinstate it more than 6 months later. Indeed, the Board in *Koppers Company, Inc.*,[6] found that Section 10(b) of the Act barred reinstatement of a charge by a charging party more than 6 months after the alleged unfair labor practice occurred where the charging party, pursuant to a private settlement agreement with respondent union, voluntarily withdrew the charge.
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> Unlike the charge in *Koppers*, the charge here was neither voluntarily withdrawn by the Charging Party nor reinstated at the Charging Party's request. Rather, the General Counsel, relying on newly discovered evidence, exercised the discretionary authority given to him by Section 3(d) of the Act and reinstated the charge. As previously stated, the Board will not interfere with the General Counsel's exercise of his discretionary authority unless it can be shown that such authority was abused. Respondent here has not alleged, much less proved, that the General Counsel, in reinstating the charge, abused his authority. In the absence of such proof, we find the reinstatement of Washington's charge was proper and not time barred by Section 10(b) of the Act. Accordingly, we shall dismiss Respondent's exception.

The Board distinguished the *Koppers* case, and cited its decision in *Silver Bakery* which indicates that case is still viable, and that I am bound by that Board decision.

[5] See *Silver Bakery Inc., of Newton*, 150 NLRB 421 (1964).
[6] 163 NLRB 517 (1967).

The Board law in this area appears to be that if a charging party voluntarily withdraws a timely filed charge it cannot be reinstated more than 6 months after the alleged occurrence which gave rise to the unfair labor practice. On the other hand, if a regional director dismisses a timely filed charge for lack of merit, or if the charging party withdraws the charge on the recommendation of the Board agent rather than having the charge dismissed by a regional director,[7] it would appear that the General Counsel or the regional director has virtually unlimited discretion to reinstate that charge and proceed to complaint whether or not 6 months has lapsed since the occurrence giving rise to the unfair labor practice. Provided, the General Counsel or regional director has not abused his discretion, guided by whether the equities in the case compel a dismissal of the complaint and charges in view of the time that has lapsed between the withdrawal of the charge and the notice to the parties of the decision to reopen the case.

It is clear in this case that the Charging Party withdrew the charge on the recommendation of the Board agent and the withdrawal of that charge was approved by the Regional Director. Additionally, the new charges filed with the Hartford Office in November, and amended in November, raised newly discovered evidence which allegedly cast some doubt upon Respondent's economic defense to the layoff of June 19, and therefore cast the layoff in a different light. This evidence was sufficient to cause the Regional Director to reconsider the approval of the prior withdrawal of the charge filed in June, and caused the Regional Director to withdraw that approval and to reinstate the charge and to reopen the investigation of the case. While there is no explanation as to why this took the Regional Director from December 1979 until April 1980, there is also lack of any evidence which would show an abuse of discretion on the part of the Regional Director. Under these circumstances, and in view of the Board's decision in *Silver Bakery* and *California Pacific Signs*, which are binding on me, I must conclude that the charge and complaint in this matter are not barred by Section 10(b) of the Act, and the issue of the legality of the June 19, 1979, layoff is properly before this Administrative Law Judge for decision.

The 8(a)(1) Allegations

The record reflects that 1978 was a very good year for the automobile industry and for Winer Motors. At the beginning of 1979 Respondent had approximately 13 salesmen employed in new and used foreign and domestic car sales. In February and March 1979 business apparently began falling off at Winer Motors, and the Company discharged all of its salesmen except John Roberts and Ted Pasqurello. According to Allan Winer, Respondent's general manager, the salesmen were discharged because they were not doing their job properly, the Company was starting to go down hill, and gross profits on the cars were dropping by a large amount. John Roberts was retained because he had been with the Company for approximately 20 years and was doing his job properly. Pasqurello was retained because he was a new employee and had not fallen into the same pattern or mold as the other salesmen. It appears that shortly before the discharge of these employees nine of them had joined the Union. During the time in which they were discharged the employees actively picketed the premises of Respondent and that picketing continued until they returned to work by agreement between Respondent and the Union. The day after picketing started the Employer was approached by the union representative who informed Respondent that the Union represented a majority of the salesmen and wanted to bargain with Respondent concerning the employees. Allan Winer admitted that while the employees were on picket line he possibly informed them that they did not need the Union, that they could have contracts directly with the Employer, and that if the employees would come back and give up the Union they could work out their problems.

The election among Respondent's salesmen was held on June 1, which ultimately resulted in the Union being certified as the bargaining representative of the employees.

Robert Moody credibly testified that while on the picket line they were approached by Allan Winer who informed the picketing employees that if they came back to work everything would be forgiven and that they could sit down with his attorneys and negotiate a contract and that they did not need a union, and that working conditions would be improved. Moody also testified that in April he was approached by Sam Winer, a part owner of Respondent, who handed him a letter and asked him to read the letter and added that he would never allow the Union in his place of business, except perhaps over his dead body. Moody further testified that in June he had a conversation with Tomasulo, the new-car sales manager, who informed him that the Union would never get in at Winer Motors because Harold Winer would spend any amount of money necessary to keep it out. Moody also testified that on the morning before the election he overheard a conversation between Tomasulo, Rocco Goduti, Respondent's used-car sales manager, and employee Jack Allan. These supervisors were telling Allan to vote against the Union and that it would be smooth sailing without the Union and if the Union were successful the employees would be subject to losing some of their privileges.

The above conversations, acts, and conduct were outside the 10(b) period, and cannot constitute violations of the Act which can be found pursuant to the complaint in this matter. However, as background evidence this material can be considered in determining Respondent's attitude toward unions in general, the Union specifically, and most definitely can be helpful in shedding light on Respondent's subsequent actions.[8]

Paragraph 8 of the complaint alleges that, in July, Respondent threatened employees with discharge because they joined and assisted the Union. In support of this al-

[7] Thus a charging party should be in no worse position by voluntarily withdrawing a charge rather than have it dismissed, than he would otherwise be if the regional director actually dismissed the charge on merit.

[8] It is clear that these acts and conduct would be violations of Sec. 8(a)(1) of the Act were they not outside the 10(b) period.

legation employee Michael Frank testified credibly that, around July 27, he was discussing a problem he had with a deal with Allan Winer and Winer got a little angry with him and said, "this isn't Mickey Frank Motors, this is Winer Motors. And, he also said, that he was going to write up—make a list of everything I do wrong and blow me out the door." A couple of hours later Winer returned and apologized to Frank. Frank testified that at sales meetings he would inform management that they were short of salesmen and should hire more salesmen. At these meetings Jerry Tomasulo and Rocco Goduti said they would not hire any union salesmen back, that they would close the doors first. Frank testified further that in November he overheard Allan Winer and Rocco Goduti stating that on the advice of their attorneys Winer Motors should start building up a case against the Union salesmen for not following company procedure and policies and fire them. Frank testified that he related this conversation to fellow employee Tevolits who indicated that he did not want all this harassment, and was thinking of quitting. The next day Tevolits got three written warnings which he was not pleased about. It appears that several days after this Tevolits left Winer Motors. A few days later Frank started receiving written warnings. And when he would mention to management that he thought these warnings were unfair and harassing, and indicating that he would file unfair labor practice charges, Respondent's agents informed him to file his unfair labor practices. Allan Winer denied making any threats to any of the salesmen because of their union activities.

As I credit the testimony of Frank over that of Allan Winer there is no question in my mind but that Winer did threaten Frank with making a list of everything he did wrong, and that he would eventually "blow him out the door" (discharge him). And in view of Respondent's general antiunion attitude it is clear in my mind that this statement was made because of the union activities of Frank and of the union activities of his fellow employees. Respondent was aware that Frank was one of the original employees discharged in March, that he picketed during the period while these employees were discharged, and that he returned to the plant solely because of the agreement between Respondent and the Union. It is quite clear that Respondent was unhappy with the fact that these employees who supported the Union were back working under Respondent's roof. In my view this remark was clearly made by Winer to Frank to intimidate, restrain, and coerce Frank because of his past and continued support for the Union, in violation of Section 8(a)(1) of the Act, and I so find.

Paragraph 9 of the complaint alleges that in September Respondent threatened employees that it would be futile for them to select the Union as their bargaining representative. In this regard Uli Plum testified that one night in September, following a union meeting, he went to a restaurant bar called the Jekyl and Hyde in Bridgeport, Connecticut, around 12:30 a.m. and while there Allan Winer came into the restaurant, and in response to Plum's query as to when he was going back to work, said, "you want to go back to work, why—would you resign from the Union and them come back to work." At which point Plum told Winer that he would not sign one of the letters which had been circulated denouncing the Union, to which Winer asked him why and Plum told him that it was untrue and ridiculous. Plum told Winer that Respondent could function perfectly well with the Union, and Winer said, "no way" was Respondent to have a union. I credit the testimony of Plum over that of Winer, particularly as Winer merely gave a general denial of any threats to any employee. Therefore, it is my conclusion that by this statement Winer was conditioning Plum's reinstatement upon his resigning from the Union, and that Winer made it clear that a union would not be in at Respondent's premises and that it was futile for the employees to join or assist the Union. Both statements are clear violations of Section 8(a)(1) of the Act, and I so find.

Paragraph 10 of the complaint alleges that, in November and December, Respondent threatened employees that no new employees would be hired until the employees abandoned support for the Union. No evidence was offered to support this allegation and I shall recommend that paragraph 10 of the complaint be dismissed.

Paragraph 11 of the complaint alleges that in January 1980 Respondent threatened employees with physical harm if they joined, supported, or assisted the Union and threatened employees with layoff if they joined, supported, or assisted the Union. In support of this allegation employee Mickey Frank testified that in mid-November 1980 he was called into Allan Winer's office where he was questioned about a constructive discharge. Thereafter, Winer told Frank that he was lucky to be working for nice guys like Respondent. He then told Frank about another dealer whose salesmen wanted to form a union, and the owner of that dealership said that he would kill any salesman who wanted to join a union, and that fellow never had a union in his place. Winer then asked Frank what he would do if somebody told him that they would kill him if he wanted to form a union. Winer told Frank that if he did not like it at Winer Motors he should leave. Winer then informed Frank that business was slow and that he was considering laying him off.

It is my conclusion that this conversation contained a veiled threat of physical harm for continued support of the Union, and that Winer also threatened Frank with layoff because of his continued support of the Union, all in violation of Section 8(a)(1) of the Act.

Paragraph 12 of the complaint alleges that on April 1, 1980, Respondent threatened employees with physical harm because they joined, supported, or assisted the Union.

Mickey Frank testified that in April 1980 while he was in the parking lot Matthew Corvo came over to him and quite angrily said that he had been working at Winer Motors for 11-1/2 years and if Winer Motors went out of business he would personally take care of Frank. Frank told Corvo that he thought this was a terrible threat, and was illegal, and Corvo repeated the threat again and walked away. Frank testified that he brought this to Allan Winer's attention, and Corvo was called into the office and after Frank repeated what had happened Corvo denied this and the matter was dropped. At

the hearing Corvo testified that he recalled being accused of such a threat by Frank, and that he had denied the matter then and that he denies the matter now.

As I credit the testimony of Frank[9] over that of Corvo it is my conclusion that these statements were made and that Frank was threatened with physical harm because of his support for the Union in violation of Section 8(a)(1) of the Act.

The 8(a)(3) and (5) Allegations of the Complaint

Paragraph 13 of the complaint alleges that on or about June 19 Respondent laid off its employees Robert Moody, Stephen Bernstein, and Uli Plum and paragraph 14 of the complaint alleges that in September Respondent refused to reinstate its employee Uli Plum because these employees joined, supported, or assisted the Union and to discourage employees from engaging in such activities or other concerted activities in violation of Section 8(a)(1) and (3) of the Act.

Respondent admits that these three employees were laid off on June 19, as alleged, but contends that the layoff was prompted by economic reasons and not for discriminatory reasons as alleged in the complaint.

In February, nine of Respondent's salesmen determined that they wanted to be represented by the Union. They approached Ed Iulo and thereafter all signed union cards. Two days later, on Wednesday, March 7, all nine of the salesmen were discharged. The ostensible reason for the discharge of these nine salesmen was because they were not bringing any business into the Company and were not performing their job properly. Thereafter, the Union interceded on the behalf of these employees, a picket line was established, and by agreement between the Union and Respondent the employees were returned to work. While the salesmen were on the picket line they were approached by Allan Winer who offered to take them back without the Union and offered them individual contracts. Notwithstanding, the reason for the discharge of these nine salesmen, Respondent was more than willing to reinstate them to their former positions if they abandoned their support for the Union, and even offered them individual contracts and improved working conditions. In these circumstances, it is obvious that the union activities of the salesmen were the reason behind Respondent's swift action in discharging them.

Although, these nine salesmen were permitted to return to work as a result of the agreement, Respondent continued its efforts to persuade the employees to abandon the Union. Thus, in April Sam Winer, one of the owners of Respondent, informed Robert Moody that he would never allow a union in his place of business, and that Respondent would spend whatever amount of money was necessary to keep the Union out. Additionally, Respondent threatened at least one employee with loss of benefits if the Union won the election.

Also, on May 29, 3 days before the June 1 election, Respondent sent a letter to all of the previously discharged salesmen advising them of the fact that they held their positions solely because of the stipulated judgment and contract between the Union and Winer Motors of March 13, 1979. The employees were told that Respondent considers them to be properly discharged employees and therefore not entitled to vote in the upcoming election. In my view, this is clearly a warning to these employees that should they be entitled to vote in the upcoming election they would be wise in voting against the Union. On the day of the election the ballots of these employees were challenged on the basis that they were not employees of Respondent.

On June 19, while objections and challenges to the election were pending, Respondent laid off four of its domestic car salesmen. This was the first layoff in the history of the Company and three of the four salesmen laid off had signed union cards, been involved in the previous discharge, and had picketed in March. As indicated earlier Respondent contends that these four salesmen were laid off for economic reasons.

Respondent offered extensive testimony and exhibits to support the proposition that the Company was in a bad economic condition in June 1979. For the purpose of this decision I will accept, for the sake of argument, that the Company was in an economic decline in June of 1979, presumably as a result of the gasoline situation at that time. However, from the evidence presented in this case, it does not appear that a layoff is the answer to an economic decline in the automobile sales industry, as would be the case in a production and manufacturing plant. Here the salesmen receive no wages but are paid strictly on a commission, based on sales. Thus, if they do not sell they are paid nothing, and therefore it costs the Company nothing, except for the nominal amount of $36 a month for medical coverage, $50 a month for workmen's compensation, and payroll tax of 10 percent of earnings. As Moody was not under the medical coverage, this cost the company nothing for him. Therefore, it would appear that Respondent's total cost for these three employees in a given month would be approximately $220.

As sales is the guts of the business in the new- and used-car industry, it would appear with the nominal cost per month per salesman, unlikely that a company would lay off salesmen during an economic decline. It would seem that the way to fight an economic decline would be to boost sales, even if it were necessary to hire additional salesmen. This appears to have been the practice in the past for there had never been a layoff at Respondent, yet there must certainly have been other economic declines.

Three of these salesmen, Plum, Moody, and Bernstein were experienced salesmen and certainly would have been an asset in an economic decline. Because of the inconsistent and contradictory testimony among Respondent's witnesses concerning its economic status in June 1979, and because it does not appear to me that a layoff would be the appropriate thing in an economic decline in the new- and used-car sales business, it is my conclusion that Respondent's economic justification for the layoff is a pure sham and a pretext to cover up its true motive.

The discharge of Plum, Moody, and Bernstein in March for their union activities, and Respondent's expressed position that it would never allow a union in the

[9] Frank's testimony was straightforward and had a ring of truth. On the other hand the testimony of Corvo, like that of Allan Winer, left me unimpressed and did not sound sincere or truthful.

plant regardless of the cost, clearly demonstrate to me Respondent's union animus. Moreover, in September Allan Winer conditioned reinstatement of Plum on his resignation from the Union, and then informed Plum that there was no way that Respondent was ever going to have a union. Additionally, in sales meetings in November Respondent continually informed the salesmen that there would be no more salesmen until this union thing was settled, and that Respondent would close its doors before hiring any union salesmen. These facts clearly show that Respondent's refusal to recall the salesmen was discriminatory, and in my view indicates that the initial layoff was discriminatory. In these circumstances, it is my conclusion that Respondent laid off employees Moody, Plum, and Bernstein on June 19, 1979, because of their support for the Union and their activities on behalf of the Union in an effort to discourage membership in, and support for, the Union at Respondent's premises, clearly in violation of Section 8(a)(3) and (1) of the Act.

Paragraph 14 of the complaint alleges that, in September 1979, Respondent refused to reinstate Uli Plum because of his activities on behalf of the Union and in order to discourage employees from engaging in union activities and other concerted activities. In view of my previous conclusions with regard to the conversation between Allan Winer and Uli Plum in September it is my conclusion that the General Counsel has sustained his burden of proof in support of this allegation of the complaint, and I so find. Therefore, by this action, Respondent clearly violated Section 8(a)(3) and (1) of the Act.

Paragraph 15 of the complaint and conclusionary paragraphs 23, 29, and 30 allege that, in November 1979, Respondent changed the working conditions of its employees by initiating a disciplinary warning system because of its employees' support for the Union and in order to discourage employees from engaging in such activities, in violation of Section 8(a)(3) and (1) of the Act, and by such unilateral action Respondent has failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act.

This record reflects that in July after the election Respondent announced the institution of a written warning system to its salesmen; however, there does not appear to be any implementation of that system until November. The statement in July, by Allan Winer that he was going to make a list of everything that Frank did wrong, and blow him out the door, sheds some light on the motivation and the thinking of Respondent at the time of the institution of the written warning system. This statement would indicate that the warning system was illegal from its inception and was designed to dissuade the employees from further supporting the Union.

As indicated there was no evidence of the implementation of this warning system until November, after the Board's certification of the Union on October 5, 1979. In early November Frank overheard Allan Winer instructing his managers to build up a case against the union salesmen for not following company procedures and policies in order to fire him. Thereafter, on November 6, the first written warnings were issued.[10] Additionally, on November 6, Robert Tevolits, a prounion employee received several written warnings. At the time the warnings were given to Tevolits, Manager Tomasulo told him that it was a new company policy, and that the warnings were being given on the advice of counsel. Tevolits realizing that the harassment had started, and that Respondent was building a case against him, went to Allan Winer and gave his 2 weeks' notice prior to quitting. The following day, Respondent took Tevolits' demonstrator automobile from him and informed him he would not need it. He was told by Allan Winer that he would not be interested in working at Winer Motors with the policies that were going to be followed, and also told Tevolits to take Mickey Frank with him. At this point Tevolits quit. Tevolits testified that he felt compelled to quit, before he received so many warnings that would jeopardize his getting another job. The General Counsel argues that Respondent constructively discharged Tevolits in violation of Section 8(a)(1) and (3) of the Act.

As indicated earlier, the warning system was instituted in July but was not implemented until November. It appears that, following a meeting with the company attorneys, Allan Winer instructed his managers to build up a case against the union salesmen for not following company procedures and policies in order to fire them. Consistent with this plan on November 6, the written warnings began to issue. Thus, on this date Tevolits, the only remaining prounion employee other than Frank left in the employ of Respondent, received a number of warnings. He was told at that time by Manager Tomasulo that this was the new company policy and that these warnings were being given on the advice of counsel. This appears to explain the reason why the implementation of the warning system occurred in November. Tevolits testified that he realized that Respondent was beginning to build a case against him, and that he would be harassed thereafter, and in order to preserve his record he felt it was necessary to quit before it was too late. The following day, Respondent took Tevolits' demonstrator automobile away from him, informing him that he would not need it, and later told him that he would not be interested in working at Winer Motors with the new policies that were going to be followed. He was also asked to take Frank with him when he left.

There is no doubt that Tevolits felt compelled to quit Respondent's employment before his record was injured and he would be unable to obtain gainful employment elsewhere. In view of his known union activity, the unilateral nature of the warning system itself, the animus of Respondent toward the Union, and the fact that Respondent had indicated that it was going to use the warning system to build cases against its salesmen, it appears to me that Respondent caused the termination of Tevolits, because of his support for the Union and to discourage such support among its employees in violation of Section 8(a)(3) and (1) of the Act.

After Tevolits left Respondent's employ, Respondent began issuing written warnings to Frank. By the time of

[10] See G.C. Exhs. 10(a) and (b).

the hearing Frank had received over 30 written warnings. The warning system initiated in July contemplated only one verbal order, one written order, and then discharge. The fact that Frank received some 30 warnings and was not discharged indicates that these warnings were not part of a progressive system of discipline but were used as a means of harassing employees. It appears for the most part the warnings were used to harass prounion employees, and as the warning system was unilaterally imposed it is my conclusion that the implementation of the written warning system in November violated Section 8(a)(1) and (5) of the Act,[11] and because of its discriminatory application against prounion employees to discourage continued support of the Union, this also violated Section 8(a)(3) of the Act, and I so find. See *Fidelty Telephone Company*, 236 NLRB 166 (1978), and *Daniel Construction Company, a Division of Daniel International Corporation*, 244 NLRB 704, fn. 2 (1979).

Paragraph 21, of the complaint alleges that on or about March 25, 1980, Respondent changed the working conditions of its employees by instituting a new pay plan. Paragraphs 29 and 30 of the complaint allege that this conduct violated Section 8(a)(1) and (3), and Section 8(a)(1) and (5) of the Act, respectively. At the hearing Respondent conceded the violations as alleged in paragraphs 21, 29, and 30 of the complaint and the parties entered into a stipulation to that effect. Accordingly pursuant to the stipulation, it is my conclusion that, by instituting the new pay plan with regard to certain market products and services such as rustproofing, polygly-coating and extended warranties, Respondent has violated Section 8(a)(1), (3), and (5) of the Act. Therefore, I shall recommend that Respondent revert to the status quo as it existed prior to March 1980, and reimburse its salesmen for any loss they may have suffered as a result of Respondent's changes, and bargain with the Union before it makes any further changes in working conditions.

Paragraph 22 of the complaint alleges that on or about May 22, 1980, Respondent rescinded its reinstatement offer to employee Robert Moody thereby discriminating against Moody and discouraging membership in the Union, in violation of Section 8(a)(1) and (3) of the Act.

In April 1980 Respondent had a serious shortage of salesmen and at that time offered reinstatement to the three employees who had been laid off in June 1979. Respondent had no intention of rehiring these employees because, when Plum discussed this matter with Allan Winer, Winer informed him that business was bad, and the Company would probably go bankrupt, and he was going to "flood the floor with salesmen." Obviously Plum would not want to return under these conditions, and therefore he did not accept the offer to return, but decided to remain where he was. Moody, on the other hand, was anxious to return, and when he received the April 21, 1980, letter he so informed Respondent. At that time he also informed Respondent that he was in the hospital for tests, and as soon as he was able he would make an appointment with Respondent to discuss returning to work.

On May 22, 1980, Allan Winer informed Moody that due to his physical condition Respondent's insurance carrier had advised that it could not afford insurance coverage and that Moody should not be placed back on duty due to the financial risk the Company might face in the event of his illness causing a disability.

Moody has been a diabetic since 1956 and indicated this on his initial application at Winer Motors in 1975. Additionally, Moody had discussed his diabetic problem with members of management.

It appears that Moody's diabetic condition only became a problem to Respondent when it needed additional salesmen in April 1980 and believed that it must rehire the employees that it laid off in June 1979. Having discouraged Plum from seeking reinstatement, Respondent realizing that it could not discourage Moody decided that it would preclude Moody's reinstatement by rejecting Moody because of his physical impairment.

Under the circumstances, particularly in view of Respondent's unlawful termination of Moody on June 19, 1979, and its statement to Plum that it would take the employees back only if they abandoned the Union, it appears that Respondent had the same mental attitude at the time Moody agreed to accept reinstatement, and Respondent's only way to avoid reinstating Moody was to rely on his health problem. It is my conclusion that Respondent had no intention of reinstating any of its former union salesmen and that it latched upon Moody's health problem strictly as a pretext in order to foreclose reinstatement. Moreover, even if Respondent were legitimately concerned about its financial responsibility in the future because of Moody's diabetes it would appear that Respondent cannot rely upon this excuse, because it originally discriminated against Moody in the initial layoff or termination on June 19, 1979. Thus, a preexisting medical condition cannot justify a refusal to reinstate an illegally discharged or terminated employee. In my view the refusal to reinstate Moody in April 1980 was discriminatorily motivated and independently violated the Act. As I have concluded that Respondent violated Section 8(a)(1) and (3) by laying off Moody, Plum, and Bernstein, it is also my conclusion that by conditioning Plum's reinstatement upon his abandoning the Union, and withdrawing the offer of reinstatement to Moody, Respondent has also violated Section 8(a)(1) and (3) of the Act.

III. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with Respondent's operations have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[11] On October 5, 1979, the Union was certified as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> All full-time and regular part-time new and used foreign and domestic automobile salespersons employed by the Employer; excluding office clerical employees, service and maintenance employees, guards and supervisors as defined in the Act.

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent committed violations of Section 8(a)(5) of the Act by unilaterally changing the working conditions of its employees by initiating a disciplinary warning system and by instituting a new pay plan without bargaining with the Union the certified bargaining representative of its employees, I shall order that Respondent discontinue its written warning system and rescind all warnings issued to its employees, restore the sales of aftermarket services to the salesmen, and make all salesmen whole for any loss of wages as a result of the unilateral action of Respondent, and bargain in good faith with the Union concerning any future changes in the working conditions of its employees.

As I have found that the June 19 layoff of Uli Plum, Robert Moody, and Stephen Bernstein was discriminatory in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement, unless reinstatement has already been offered, to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings they may have suffered as a result of Respondent's discrimination, until such time as Respondent makes them a valid officer of reinstatement, with interest. See *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Florida Steel Corporation*, 231 NLRB 651 (1977).

As I have found that Respondent constructively discharged Robert Tevolits on November 9, 1979, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement, unless reinstatement had already been offered, to his former job, or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he may have suffered as a result of such discrimination, until Respondent has made a valid offer of reinstatement, with interest.

Upon the foregoing findings of fact, and the entire record, I make the following:

CONCLUSIONS OF LAW

1. Winer Motors, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Brewery and Soft Drink Workers, Liquor Drivers, and New and Used Car Workers, Local 1040, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time new and used foreign and domestic automobile sales persons employed by the Employer; excluding office clerical employees, service and maintenance employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 5, 1979, the Union has been the certified bargaining representative of the employees in the unit described above in paragraph 3, and is now the exclusive representative of all the employees in the aforesaid bargaining unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By threatening employees with discharge because of their support for the Union; by threatening employees that it would be futile for them to select a union as their bargaining representative; by threatening employees with the denial of reinstatement unless they abandon their support and assistance to the Union; by threatening employees that no new employees would be hired until the employees abandon their support for the Union; by threatening employees with physical harm if they joined, supported, or assisted the Union; by threatening employees with layoff if they joined, supported, or assisted the Union; and by soliciting employees to abandon their support of the Union, Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

6. By discriminatorily laying off Robert Moody, Uli Plum, and Stephen Bernstein on June 19, 1979, to discourage membership in the Union; by changing the working conditions of its employees by discriminatorily instituting a written warning system, by discriminatorily instituting a new method of payment in connection with after-market services, and by issuing discriminatorily unwarranted written warnings to its employees to discourage membership in the Union, Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

7. By unilaterally and without bargaining with the Union implementing a written warning policy and changing the method of marketing after-market services, Respondent has engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

8. By constructively terminating the services of Robert P. Tevolits on November 9, 1979, because of his membership in the Union and in order to discourage membership in the Union, Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act; by conditioning Uli Plum's reinstatement upon his abandoning the Union, and by refusing to reinstate Robert Moody because of his medical condition in order to discourage membership in the Union, Respondent has engaged in conduct violative of Section 8(a)(3) and (1) of the Act.

The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The Respondent, Winer Motors, Inc., Stratford, Connecticut, its officers, agents, successors, and assigns, shall:

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Soliciting its employees to abandon support for the Union.

(b) Threatening employees that it would be futile for them to select the Union as their bargaining representative.

(c) Threatening employees with denial of reinstatement unless they abandon their support and assistance for the Union.

(d) Threatening employees that no new employees would be hired until the employees abandon their support of the Union.

(e) Threatening employees with physical harm if they join, support, or assist the Union.

(f) Threatening employees with layoff if they join, support, or assist the Union.

(g) Laying off, constructively discharging, discharging, or otherwise discriminating against its employees because of their activities on behalf of the Union, or any other labor organization, to discourage membership in the Union or any other labor organization of its employees.

(h) Discouraging membership in the Union or any other labor organization of its employees, by discriminating in regard to hire, tenure, or other terms and conditions of employment.

(i) Unilaterally changing the working conditions of its employees by instituting disciplinary warning systems or initiating new pay plans, or in any other manner changing the working conditions of its employees without bargaining with the Union.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Immediately discontinue its discriminatory warning system, and immediately discontinue its discriminatory new pay plan relating to after-market services.

(b) Upon request, bargain with the Union as the exclusive representative of the employees in the above-described unit at its facility in Stratford, Connecticut.

(c) Offer immediate and full reinstatement to Robert Moody, Stephen Bernstein, Uli Plum, and Robert Tevolits, unless reinstatement has already been offered, to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as the result of the discrimination against them.

(d) Immediately rescind all warnings issued to employees under the discriminatory warning system promulgated by Respondent.

(e) Post at its Stratford, Connecticut, facility copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Officer-in-Charge for Subregion 39, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Officer-in-Charge for Subregion 39, in writing, within 20 days of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

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[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."